



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1264

Case No. 1347

Against: The Commissioner-General
of the United Nations
Relief and Works Agency
for Palestine Refugees in
the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Mr. Kevin Haugh, Vice-President;
Mr. Goh Joon Seng;

Whereas at the request of a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), the President of the Tribunal, with the agreement of the Respondent, extended to 31 March 2004 the time limit for the filing of an application with the Tribunal;

Whereas, on 24 March 2004, the Applicant filed an Application requesting the Tribunal, *inter alia*,

“2. ...

(a) to rescind the decision of the Commissioner-General [of 13 August 2003]; and

(b) to order:

(i) that I receive financial compensation for the non-extension of my contract to my regulatory retirement age on 17 May 2002, in the amount of the salary and other emoluments which I would have received had my contract been extended until that date, in

- conformity with the recommendation of the UNRWA International staff Joint Appeals Board [(JAB)] ...,
- (ii) that I be treated for all relevant purposes, in particular for contributions to the United Nations Joint Staff Pension Fund, as if my contract had been extended until that date, and
 - (iii) that I receive additional compensation in the amount of US\$ 10,000 for moral injury caused to me by the unreasonable delay of the Commissioner-General in taking 17 months from receipt of the recommendation of the [(JAB)] until he rejected the recommendation of the Board. In this context I would be grateful if the Tribunal would consider this application as a matter of urgency.”

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent’s answer until 31 August 2004 and periodically thereafter until 31 March 2005;

Whereas the Respondent filed his Answer on 31 March 2005;

Whereas the Applicant filed Written Observations on 23 May 2005, and the Respondent commented thereon on 28 October;

Whereas the statement of facts, including the employment record, contained in the report of the JAB reads, in part, as follows:

“Background to the Appeal

... The [Applicant] joined the Agency on 18 May 1992 on a fixed-term appointment [at the P-4 level] as Field Technical Officer, West Bank (...). The [Applicant’s] contract was subsequently extended on three separate occasions until 17 May 2000 ... [In each of the Applicant’s Performance Evaluation Reports (PERs) from 18 May 1992 until 31 May 1997, his overall performance was rated as ‘a very good performance’.]

... Effective 12 August 1996, the [Applicant] was re-assigned to Damascus as Field Technical Officer, [Syrian Arab Republic (SAR)].

... For the period 2 June 1997 until January 1998, the [Applicant] was appointed Officer-in-Charge, Technical Department, Lebanon, in addition to his duties as Field Technical Officer, SAR.

... A special audit was carried out by UNRWA senior auditors from 2 to 11 December 1998 on [a] contract ... [for construction undertaken] ... in the Central Lebanon Area. The internal auditors concluded that

‘what began as a project that was following Agency procedures, collapsed because of an error of commission by two staff members

and, furthermore perpetuated by errors of omission by those charged with managerial and oversight responsibilities’.

... As a result of the foregoing conclusion, the Director of UNRWA Affairs, Lebanon, appointed a Board of Inquiry [(BOI)] to establish the facts and determine any involvement therein of Agency staff. On 9 May 1999, the Board submitted its report and found the [Applicant]

‘professionally negligent in that he failed to exercise due care and did not adequately supervise the Technical Office and the conduct of the tender ... Further, on learning of the irregularity in the tendering process, he failed to take appropriate steps to remedy the situation and they contributed to the violation of the tendering process’.

... In view of the [BOI’s] findings, the [Applicant] was served with a letter of reprimand on 9 May 1999. The [Applicant] asked for, and received in relevant part, the Board’s findings as to his negligence but did not choose to contest the findings or the reprimand.

.... The [Applicant’s PER] for the period from 1 March 1998 to 31 January 2000 was completed by the Director of UNRWA Affairs, SAR, on 19 March 2000 and was discussed with the [Applicant] on the same day. His overall performance was described as being ‘a satisfactory performance’.

...

... The Director of UNRWA Affairs, SAR, recommended in the [PER] that ‘[the Applicant’s] contract with the Agency be extended for a further two years, to normal retirement age, with a review after one year of progress ...’.

... On 11 April 2000, the Head, Technical Office, HQ Amman, completed part of Section V of the [Applicant’s PER] stating: ‘I recommend that [the staff member] be extended, but in two one year steps, as agreed with [Director of UNRWA Affairs, SAR,] at a recent discussion of [the staff member]’s PER in Amman. See also my attached comments’.

... On 13 April 2000, [the] Head, Technical Office, HQ Amman, wrote to the Director of Administration and Human Resources commenting on the [Applicant’s PER], ... [The] Head, Technical Office, HQ Amman, agreed with the Director of UNRWA Affairs, SAR’s evaluation on most points and indicated, inter alia, that the [Applicant] ‘seems to lack the judgement needed to decide when flexibility and independence of actions are called for. This has caused considerable confusion, has produced abortive work, and caused ill feeling with donors’. [The] Head, Technical Office, HQ Amman, recommended that the [Applicant’s] contract should be extended for one year only and that his performance be reviewed at the end of the period.

... On 25 April, the [Applicant] signed his [PER]. [The comments of the] Head, Technical Office, HQ Amman, ... were not attached to the [PER].

... On ... 2 May 2000, the Human Resources Committee [(HRC)] met and discussed the [Applicant’s] performance taking into consideration the recommendations of the Director of UNRWA Affairs, SAR, and [the] Head, Technical Office, HQ (Amman). As a result, the Committee recommended a final extension of the [Applicant’s] contract for a period of six months. The Commissioner-General did not approve the recommended extension but

directed that he be provided with additional information on the [Applicant's] case.

... On 25 May 2000, [the] Head, Technical Office, HQ Amman, informed the Chairman of the [HRC] ... that the ... Committee's recommendation to extend the [Applicant's] fixed-term appointment for a final period of six months was appropriate.

... On 29 May 2000, the [HRC] met again and reiterated its previous discussion of the [Applicant's] case at its meeting on 2 May 2000. It noted that the [Applicant] was issued with a letter of reprimand and that he had passed on 'more than one occasion, damaging information to Agency donors'. It further noted that although the [Applicant's] last [PER] reflected an overall satisfactory rating, the individual ratings and comments suggested an uneven performance. The Committee also noted [the] Head, Technical Office's memorandum of 25 May ... As a result of its discussion, the Committee recommended to the Commissioner-General that the [Applicant's] fixed-term appointment be extended for a final period of six months. ...

... On 21 June 2000, the [Applicant] was informed that the Commissioner-General had approved a final extension of his appointment for six months until 17 November 2000. ...

... [The same day], the [Applicant] ... request[ed] a justification of the [HRC] for only extending his contract for a final period of six months. [He was subsequently advised by the Director of Administration and Human Resources that the 'HRC considered that [his] overall performance was not reflected properly in the PER, which itself contained several inconsistencies'.]

... On 11 July 2000, the [Applicant] wrote to the Commissioner-General requesting [administrative] review of the decision to extend his appointment for a period of only six months.

...

[On 10 September 2000, the Applicant lodged an appeal with the UNRWA International staff JAB in Gaza.]

... In a Note for the Record of 21 September 2000, the Director of Administration and Human Resources and the Director of UNRWA Affairs, SAR, recommended an extension of the [Applicant's] contract to allow for the completion of projects in the SAR Field and a proper hand-over to the new Field Technical Officer. The Commissioner-General approved the extension.

... On 26 September 2000, the [Applicant] was offered and accepted a further and final extension of his appointment for three months until 17 February 2001."

The JAB adopted its report in January 2002. Its findings, conclusion and recommendation read, in part, as follows:

"Findings of the Board

...

38. The Board ... notes that since the early 1990s, UNRWA no longer offers indefinite contracts to its International staff. However, from that time onwards, the Agency has generally followed the practice to renew fixed-term contracts in respect of posts which are still needed and in respect of incumbents whose latest [PER] is at least satisfactory. On the basis of this practice, not only the Appellant's two supervisors, but also the Director of Administration of Human Resources, who is primarily responsible for the development of policies and procedures in respect of the Agency's staff, recommended that the Appellant's contract be extended. This is reflected in the minutes of the [HRC] meeting of 29 May 2001 ...

39. The Board examined the stated reasons advanced by the Administration in motivating their decision to extend the Appellant for a final six-month period instead of two years which would have brought the Appellant up to regulatory retirement age.

...

Conclusion

40. The Board noted that the Appellant's fixed-term contract was extended a total of five times covering a period of eight years and nine months. Further, all of these extensions were effected in accordance with standard Agency practice (i.e. subject to satisfactory performance etc.), with the exception of the last two extensions, which were for periods of six and three months respectively. Throughout, the Appellant's employment with the Agency his performance was consistently rated as 'very good' with the exception of his last [PER], which was rated as 'a satisfactory performance'. Taking the above into consideration [as well as] the fact that the Appellant occupied an indefinite post and the Agency's own policy ..., the Board [was] of the view that the Appellant had a reasonable expectancy that his contract would be extended until his regulatory retirement age.

Recommendation

41. The Board recommends to the Commissioner General that the part of the appeal which deals with the request that the Appellant's contract be extended until regulatory retirement age be dismissed, as extension is indeed a prerogative of the Administration. However, in concluding that the Appellant had a reasonable expectancy of having his contract extended up to his retirement age, the Board recommends to the Commissioner-General that the Appellant be adequately compensated to cover the loss of income for the period 17 February 2001 up to his regulatory retirement age, which the Appellant states is 17 May 2002."

On 13 August 2003, the Commissioner-General transmitted a copy of the JAB report to the Applicant and informed him as follows:

"I agree with the Board's conclusion that there is no requirement to extend your contract until regulatory retirement age. Because I do not agree that you had a reasonable expectancy that your contract would be renewed until your retirement age, I do not accept the Board's recommendation to compensate

you for loss of income up to your regulatory retirement age. In light of the foregoing I have dismissed your appeal.”

On 24 March 2004, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant’s principal contentions are:

1. The procedure used by the HRC in considering the Applicant’s PER regarding his extension of contract was fundamentally flawed and unfair.
2. The Commissioner-General erred in accepting the recommendation of the HRC.
3. UNRWA has a long-standing policy that, in respect of a post which is still needed, the incumbent may expect a contract renewal if he has been in his post for at least five years and his PER shows an overall rating of “satisfactory” or better.

Whereas the Respondent’s principal contentions are:

1. The Applicant did not have a legitimate expectation that his contract would be renewed until he reached retirement age.
2. The decision not to renew a staff member’s fixed-term appointment beyond a certain period lies within the discretion of the Commissioner-General.
3. The decision to extend the Applicant’s contract for six months was not exercised arbitrarily or capriciously, was not motivated by prejudice or other extraneous factors and was not flawed by procedural irregularities or error of law.

The Tribunal, having deliberated from 7 to 23 November 2005, now pronounces the following Judgement:

I. The Applicant joined UNRWA as an International staff member in 1992, and was employed thereafter on a series of fixed-term contracts. He was serving on a fixed-term appointment as a Field Technical Officer at the P-4 level when he was informed that his contract would not be extended beyond its expiration date of 17 November 2000.

II. It is well established that the holders of fixed-term contracts have no guarantee of renewal of their contract. The circumstances of employment in the United Nations

and its various agencies and programmes are such that it was considered necessary to create, together with other modalities of employment, a system of fixed-term contracts which may be allowed to expire without explanation or any special action. This doctrine has clear statutory basis: in the case of UNRWA International staff members in International staff rule 104.3 (a), which provides that “[t]he fixed-term appointment does not carry any expectation of renewal or of conversion to any other type of appointment”.

The Tribunal has consistently upheld the Respondent’s discretionary powers in this regard, noting in its recent Judgement No. 1237 (2005), for example, that it

“has repeatedly held that the Respondent has discretion to renew or not to renew a fixed-term contract and that, if the contract is not renewed, it comes to an end with the effluxion of the time set out in the contract itself. (See Judgements No. 440, *Shankar* (1989) and No. 1003, *Shasha’a* (2001).)”

There are, of course, exceptions to this general rule. The most obvious exception is where the staff member has been given a legal expectancy of continued employment. This may take the form of assurances of future employment, such as an express promise, or may be deduced from the general circumstances of the case in question. (See Judgements No. 95, *Sikand* (1965); No. 142, *Bhattacharyya* (1971); and, No. 1052, *Bonder* (2002).) The exercise of the Respondent’s discretionary authority must be “free of prejudice and other extraneous factors” (Judgement No. 1177, *van Eeden* (2004)) and, in cases of non-renewal of fixed-term contracts, the Tribunal requires that

“[t]he Respondent’s exercise of his discretionary power in not extending a ... contract must not be tainted by forms of abuse of power such as violation of the principle of good faith in dealing with staff, prejudice or arbitrariness or other extraneous factors”. (See Judgement No. 885, *Handelsman* (1998).)

III. In the instant case, the Applicant does not claim an express promise, but asserts that the circumstances of his employment with UNRWA gave rise to a legal expectation that his contract would be renewed. According to the Applicant, a policy or practice existed at UNRWA whereby staff members whose posts were still needed, who had occupied their posts for five or more years and whose PERs demonstrated an overall rating of “satisfactory”, could expect to have their contracts renewed.

The Respondent denies the existence of such a policy, and it is clearly at odds with the codified rules as cited in paragraph II above. Whilst the Respondent is

certainly entitled to take performance into consideration in his decision-making (and good governance would expect that he would), in accordance with both the Staff Rules and the jurisprudence of the Tribunal even excellent performance does not give rise to any legal expectancy of renewal. (See *Hussain, ibid.*) Indeed, the renewal of a fixed-term contract may be denied even if the staff member in question had the most brilliant PER.

That said, the Staff Rules cannot condone the making of false promises to staff members, or arbitrariness, discrimination or other forms of ill-treatment. If an organization or agency such as UNRWA decides to adopt certain criteria to guide itself regarding the renewal or non-renewal of fixed-term contracts, even if such criteria are not legally required or give rise to rights over and above those enshrined in the Staff Rules, such criteria must be applied to all staff members fairly and without arbitrariness or discrimination. In Judgement No. 268, *Mendez* (1981), the Tribunal stated that “equality of treatment is that those in like situation should be treated alike”, and in Judgement No. 971, *Stepanenko* (2000), it affirmed that “staff members must be treated equally, a principle which governs the management of the international civil service”. (See also Judgement No. 1221, *Sharma* (2004).)

Thus, it falls to the Tribunal to determine whether, on the facts before it, a legal expectancy of renewal of appointment was created for the Applicant.

IV. In the circumstances of this case, the Tribunal finds it very likely that the policy existed, not least because the JAB, which is in a better position than the Tribunal to know of such an unwritten policy, recognized that

“since the early 1990s, UNRWA no longer offers indefinite contracts to its International staff. However, from that time onwards, the Agency has generally followed the practice to renew fixed-term contracts in respect of posts which are still needed and in respect of incumbents whose latest [PER] is at least satisfactory.”

Furthermore, according to the Minutes of the 29 May 2000 meeting of the Human Resources Committee, both the Director of Administration and Human Resources and the representative of the International Staff Association “commented that [the Applicant’s] PER reflects satisfactory performance and that, under the rules, his appointment should be extended until his retirement age”.

Finally, the Tribunal finds that the position held by the Respondent throughout these proceedings also points towards the existence of such a policy, because a great deal of effort was invested in attempting to qualify the official rating of “satisfactory” given to the Applicant in his PER.

V. In any event, it is clear to the Tribunal that the renewal of the Applicant’s fixed-term contract was basically linked to his performance and general conduct because appended to his PER is a form regarding renewal of his contract, and both the Director of UNRWA Affairs, SAR, and the Head, Technical Office, HQ Amman, used the “comments” section on the last page of his PER to provide recommendations as to his renewal. It appears evident that they perceived their recommendations - and, indeed, the decision as to renewal or non-renewal of the Applicant’s contract - as, at the very least, closely related to the way in which the Applicant had performed. Moreover, the Tribunal has had the opportunity to study the correspondence and supporting paperwork in this decision-making process and notes that a great deal of emphasis was given to the Applicant’s conduct, particularly in the last two evaluation periods of his work with the Organization.

VI. Insofar as the Applicant’s performance is concerned, the Tribunal finds itself in agreement with the JAB. The Administration attempted to undermine the overall rating of “satisfactory” received by the Applicant, on the basis that his “individual ratings and comments suggest uneven performance”. The JAB dismissed this assertion, noting “the use of the word ‘suggest’ by the Administration, when describing ‘uneven performance’, is ambiguous and in the absence of further elaboration not conclusive”, and finding “that ‘uneven performance’ in itself cannot be deemed unsatisfactory performance if the overall rating is considered satisfactory”. The JAB concluded that the PER “provide[d] a balanced presentation of the strengths and weaknesses in the [Applicant’s] performance during the reporting period”.

Like the JAB, the Tribunal is not persuaded by the Respondent’s argument. Moreover, it finds that having given the Applicant a formal evaluation of “satisfactory”, the Respondent is bound to respect that rating. Using individual ratings to explain why, in the Applicant’s situation, “satisfactory” did not truly mean “satisfactory” is a clear violation of his rights with regard to performance evaluation. In Judgement No. 1058, *Ch’ng* (2002), the Tribunal remarked that “the Organization

has to respect and follow its procedures in keeping with what the world expects of the United Nations”. It finds that statement equally applicable in the instant case.

VII. Having determined that the Respondent’s decision regarding the renewal of the Applicant’s contract was made on the basis of his performance, and that the informal evaluation made of his performance, which undermined the formal rating of “satisfactory” he had received, was improper, the Tribunal finds that the Respondent improperly exercised his discretion in this decision-making process and that the Applicant is, therefore, entitled to compensation.

VIII. Finally, the Tribunal wishes to address the “attached comments” submitted by the Head, Technical Office, HQ Amman, along with the Applicant’s PER, which were not provided to the Applicant at the time he signed his PER on 25 April 2000. The Tribunal notes that the Head, Technical Office, HQ Amman, made a clear reference to “attached comments” in the PER, which statement the Applicant must have noticed when he signed it. Nonetheless, whilst, in the circumstances of this case, the remarks were, on the whole, merely an explanation, or elaboration, of the formal evaluation contained in the Applicant’s PER, and the Head, Technical Office, HQ Amman, opened his remarks by recommending the extension of the Applicant’s appointment, the Tribunal cannot condone the practice of “hidden” evaluations. Preventing a staff member from having access to a supplement to his PER is an obvious violation of his procedural rights. Having created a transparent system of evaluation of staff members, the Respondent is obligated to comply with his own evaluation structure, as, after all, “he must follow his own rules”. (See Judgement No. 943, *Yung* (1999).)

Accordingly, the Tribunal finds that the staff member is also entitled to compensation for this denial of his rights.

IX. In view of the foregoing, the Tribunal

1. Orders the Respondent to pay the Applicant compensation in the amount of 12 months’ net base salary at the rate in effect at the date of Judgement, with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgement until payment is effected; and,
2. Rejects all other pleas.

(Signatures)

Julio Barboza
President

Kevin Haugh
Vice-President

Goh Joon Seng
Member

New York, 23 November 2005

Maritza Struyvenberg
Executive Secretary